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HARRISBURG, PA

JUL 07 2003

MARY E. D'ANDREA, CLERK
Per _____
Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

**JOHN D. PERKEY and,
THERESA M. PERKEY,
Plaintiffs**

V.

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 :
 : **Civil Action No. 1:CV-00-1639**
 : **(Judge J. Andrew Smyser)**

**RELIABLE CARRIERS, INC.,
DANIEL JOSEPH BEMBEN and
KENT,**

Defendants

**MOTION PURSUANT TO RULE 65 OF THE FEDERAL
RULES OF CIVIL PROCEDURE SEEKING AN ORDER
FOR PAYMENT OF SETTLEMENT FUNDS INTO COURT**

1. This Motion concerns the attempted settlement by the Plaintiffs and Defendants in the above-captioned matter regarding personal injuries sustained by John D. Perkey in a truck accident occurring on September 15, 1998 while the Plaintiff, John D. Perkey,

was in the employ of ABF Freight Systems, Inc., and acting in the scope and course of said employment.

2. At the time of the accident, September 15, 1998, ABF Freight Systems, Inc. was self-insured for the payment of workers' compensation benefits to its employees who were injured in the scope and course of their employment.

3. As of the time of the accident, September 15, 1998, the Plaintiff, John D. Perkey, and ABF Freight Systems, Inc., were bound by and operating under, the Workers' Compensation Act of the Commonwealth of Pennsylvania.

4. Pursuant to the provisions of the Workers' Compensation Act of the Commonwealth of Pennsylvania, ABF Freight Systems, Inc. paid the sum of \$127,046.00 in temporary total disability benefits to the Plaintiff, John D. Perkey, and ABF Freight Systems, Inc. further paid the sum of \$52,685.58 to various medical care providers for medical expenses to treat his work-related injuries.

5. By Motion dated April 14, 2003, ABF Freight Systems, Inc. filed a Motion to Intervene to protect its workers' compensation lien regarding any recovery by the Plaintiff, John D. Perkey, concerning

personnel injury sustained in the scope and course of his employment with ABF Freight Systems, Inc.

6. By Memorandum and Order dated May 30, 2003, the Honorable J. Andrew Smyser, Magistrate Judge, denied the Motion to Intervene by ABF Freight Systems, Inc. (See Exhibit "A").

7. ABF Freight Systems, Inc. filed a Motion for Reconsideration of the Order of the Honorable J. Andrew Smyser. Said Motion for Reconsideration was denied by Memorandum and Order dated June 11, 2003 by the Honorable J. Andrew Smyser. (A copy of the Order is attached hereto and marked as Exhibit "B").

8. ABF Freight Systems, Inc. filed a Notice of Appeal to the Third Circuit Court of Appeals (a copy of which is attached hereto and marked as Exhibit "C").

9. The Plaintiffs and Defendants have filed a Joint Settlement Motion stating, at paragraph 5, that the Plaintiffs have settled their pain and suffering claims for the sum of \$55,000.00. By letter dated June 26, 2003, E. Ralph Godfrey, Esquire, counsel for the Defendants, confirmed, in writing, to Plaintiffs' counsel, his understanding of the

settlement. (A copy of the letter is attached hereto and marked as Exhibit "D").

10. ABF Freight System, Inc. hereby requests an Order requiring that the settlement funds be paid into an escrow account in order to prevent dissipation of the funds by the Plaintiffs.

11. With all due respect to the Memoranda and Orders of the Honorable J. Andrew Smyser, ABF Freight Systems, Inc. submits that since it was not covered by a policy of insurance for the payment of workers' compensation claims, but was, in fact, self-insured, that it is not subject to the Non-Duplication of Recovery provisions of the Pennsylvania Insurance & Casualty Guarantee Act. Therefore, it is submitted that there is a strong likelihood that the Plaintiff will prevail on the merits.

12. ABF Freight Systems, Inc. submits that it retains a lien against any recovery by John D. Perkey arising out of the work-related injury, and that describing the settlement as a settlement of the pain and suffering claims does not act to extinguish the lien. See Bumbarger v. Bumbarger, 190 Pa. Super. 571, 155 A.2d 216 (1959).

13. ABF Freight Systems, Inc. submits that it will suffer irreparable harm if payment into escrow is not ordered since, by his opposition to such an Order, the Plaintiffs are demonstrating that they will dissipate the funds, thereby preventing any recovery by ABF Freight Systems, Inc. for the lien.

14. Due to the fact that Rule 67 of the Federal Rules of Civil Procedure allows for payment into Court in an interest bearing account or instrument approved by the Court, John D. Perkey and Theresa M. Perkey will not suffer irreparable harm if the preliminary injunction is issued.

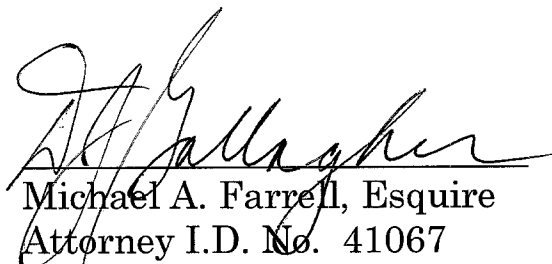
15. ABF Freight Systems, Inc. submits that this Injunction is in the public interest since it will reduce the cost of workers' compensation benefits by appropriately placing responsibility for the damages caused by the tortfeasor.

16. ABF Freight Systems, Inc. submits that it has satisfied the four-(4) factors, which support Injunctive Relief. Therefore, ABF Freight Systems, Inc. respectfully request that an Order be issued requiring that the settlement funds be paid into Court.

17. Written notice is hereby provided to the parties in interest through their counsel, as is noted in the appended Certificate of Service.

Respectfully submitted:

FARRELL & RICCI, P.C.

A handwritten signature in dark ink, appearing to read "M. A. Farrell", is written over a horizontal line.

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Dated: July 7, 2003

CERTIFICATE OF SERVICE

I, Daniel J. Gallagher, Esquire, do hereby certify that I served a true and correct copy of *ABF Freight System, Inc.'s Motion Pursuant to Rule 65 of Fed.R.Civ.P., Seeking an Order for Payment of Settlement Funds into Court* on this 7th day of July, 2003, by depositing it in the United States mail, postage prepaid and in the manner indicated below, addressed as follows:

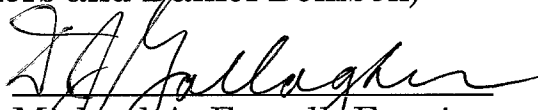
HAND-DELIVERED:

United States District Court
Middle District of Pennsylvania
Federal Building
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Harrisburg, PA 17108

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By:


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